Supreme Ct., U.S.
FILED
FEB 7 1997
CLERK

No. 96-318

In the Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON, ET AL., PETITIONERS

v.

RONNIE LEE MCKNIGHT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether employees of a for-profit corporation, acting under color of law as prison correctional officers, are entitled to assert qualified immunity as a defense to a constitutional tort action.

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INTEREST OF THE UNITED STATES

This case concerns whether private individuals, who are employed by a non-governmental, for-profit corporation that contracts with the State of Tennessee to operate a state correctional facility, may invoke the defense of qualified official immunity when they are sued, under 42 U.S.C. 1983, for constitutional torts. The outcome of this case may have important ramifications for claims made under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against private contractors acting on behalf of the federal government. See

Harlow v. *Fitzgerald*, 457 U.S. 800, 809 (1982) (it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U.S.C.] § 1983 and suits brought directly under the Constitution against federal officers") (quoting *Butz* v. *Economou*, 438 U.S. 478, 504 (1978)).

As discussed below, federal agencies enter into relationships, both contractual and voluntary, with private parties who may be subject to constitutional tort damage actions. See, *e.g.*, *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 n.5 (10th Cir. 1988) (collecting cases applying *Bivens* to private persons); *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1318 & n.3 (9th Cir. 1989) (same). The United States has an interest in ensuring effective deterrence of, and remedies for, unconstitutional conduct by persons acting on its behalf. The United States also has an interest in the ability of volunteers and other private persons under federal government supervision to assist the United States without undue distraction or inhibition.

STATEMENT

Legal requirements unique to government help promote regularity and fairness, but they have also been identified as causes of decreased efficiency and innovation in government as compared with the private sector.[1] In the interests of efficiency and innovation, governments at all levels have increasingly begun to experiment with "privatization" of

[1] See, *e.g.*, D. Osborne & T. Gaebler, *Reinventing Government* 45-47 (1992).

public services.[2] Privatization plans involve varying degrees and types of public oversight. To some extent, however, the objective of privatization is to replace direct governmental administration with private control and greater exposure to market mechanisms.

Governmental entities at all levels have responded to fiscal constraints and expanding prison populations in recent years by experimenting with the privatization of correctional functions. See Pet. Br. 2-7; International City/County Management Association, et al., Amici Br. 3-5. This case raises a question regarding the extent to which qualified official immunity may apply to employees of a for-profit corporation operating a prison that previously had been run by state government.

1. The United States Department of Justice has begun to privatize correctional and detention functions in a variety of ways, some of which are closely analogous to the Tennessee experiment that forms the context for this case. Privatization may help "to alleviate the tension between inevitable growth in the Federal inmate population and prison system while responding to Administration and Congressional initiatives to streamline Government operations." *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 14 (1995) (remarks of Bureau of Prisons Director

[2] See, *e.g.*, A. Gore, *Common Sense Government, Third Report of the National Performance Review* 77-78, 86-87 (1995); *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 96 (1995).

Kathleen Hawk). Several components of the United States Department of Justice have engaged in contracts with for-profit corporations to provide correctional or detention services. For example, since the early 1980s, both the Immigration and Naturalization Service (INS) and the United States Marshals Service have contracted with for-profit corporations to run detention facilities. The Bureau of Prisons (BOP) has contracted for the operation of certain facilities, including pretrial detention facilities and halfway houses, and anticipates contracting out more of its facilities in the future. *Id.* at 14, 38. Although BOP has not yet privatized an entire prison facility, the Bureau plans to undertake a 5-year prison privatization demonstration project involving prisons in California. See S. Rep. No. 353, 104th Cong., 2d Sess. 76-77 (1996).[3] In accordance with a bid solicitation BOP issued in November 1996, the contract for the operation of that facility must contain express provisions making the contractor responsible for all claims arising out of its operation of the facility, and requiring the contractor to defend and indemnify the United States and its employees against any such claims. Federal Bureau of Prisons, Request for Proposals No. PCC-0001, § C.1.II.A., at 8-9 (Nov. 27, 1996).

2. Consistent with the recent trend toward experimentation with privatizing correctional functions, the State of Tennessee contracts with for-profit companies to perform certain functions in state-run pris-

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[3] BOP is authorized, pursuant to 18 U.S.C. 3621(b), to enter into arrangements for the detention of prisoners in private or other non-federal correctional facilities. See *Statutory Authority to Contract With the Private Sector for Secure Facilities*, 16 Op. Off. Legal Counsel 75 (1992).

ons, and to take over the general operation of specified state prison facilities. Tennessee law authorizes the state Commissioner of Correction to enter into contracts with private enterprises and sets forth certain requirements regarding those contracts. See Private Prison Contracting Act of 1986, Tenn. Code Ann. §§ 41-24-101 *et seq.* (1990 & Supp. 1996) (*reproduced at* Pet. App. 50-64). The Act specifies the range of "correctional services" to be contracted for, including education and training, recreational and other inmate activities, information systems, food services, and general operation of facilities, including the management and custody of inmates. *Id.* § 41-24-102(2) (1990) (Pet. App. 50). The Act contemplates that independent contractors will exercise the State's police powers over incarcerated individuals; it reserves to the State certain powers, however, including establishment of procedures for calculating release and parole eligibility dates, and approving furlough and work release, as non-delegable state functions. *Id.* §§ 41-24-102(2), 41-24-110 (Pet. App. 50, 59).

The Act holds contractors responsible for the day-to-day operations of the facilities under their control. Prison contractors are not bound by state civil service laws, governmental retirement benefit plans, or laws establishing public employee qualifications. Tenn. Code Ann. § 41-24-111 (1990) (Pet. App. 59-60). They must offer services of quality equal to or better than those the State would otherwise provide, and must do so at a cost no greater than the State's cost of operating a medium or minimum security prison of like design. *Id.* § 41-24-104(c) (Supp. 1996) (Pet. App. 53-54).

The Act provides for general oversight by state officials. For example, the Commissioner of Correc-

tion retains responsibility to monitor contracts and to report at least annually to a select oversight committee of the State Legislature. Tenn. Code Ann. § 41-24-109 (1990) (Pet. App. 59).[4] Evaluation of contractor performance must take into account a range of specified factors, including whether the facilities meet professional standards, the level of staff training, the frequency and nature of complaints against staff, as well as disciplinary actions against inmates and staff. *Id.* § 41-24-105(e) (Pet. App. 55).

Among the requirements the Act places on a contractor is that it "provide[] an adequate plan of insurance, specifically including insurance for civil rights claims." Tenn. Code Ann. § 41-24-107(a)(2) (1990) (Pet. App. 57). Such a plan must be "adequate" to protect the state "from any and all actions by a third party against the contractor or the state as a result of the contract." *Id.* § 41-24-107(a)(2)(A) (Pet. App. 58). The contractor is not expressly required to insure its employees against personal liability, but its insurance must be "adequate to assure the contractor's ability to fulfill its contract with the state in all respects." *Id.* § 41-24-107(a)(2)(C) (Pet. App. 58).[5]

3. Respondent is incarcerated in a Tennessee prison, the South Central Correctional Center, that is run by a for-profit corporation, Corrections Corporation of America (CCA), under contract with the State. Petitioners are two correctional officers employed by CCA. Pet. App. 39-43 (Complaint). Respondent alleges that, while transporting him to the South Central Correctional Center, petitioners intentionally mistreated him in violation of the Eighth Amendment. *Id.* at 44-48. He claims that petitioners used overly tight restraints and taunted him when he complained that the restraints were harming him, and that the restraints caused him serious medical injury that required that he be hospitalized. *Id.* at 45-48.

Respondent sued under 42 U.S.C. 1983, and petitioners moved to dismiss the complaint based on qualified immunity. The district court denied the motion. Pet. App. 23-24. Petitioners took an interlocutory appeal pursuant to *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

4. A divided panel of the court of appeals affirmed. Pet. App. 1-22. The court noted that *Wyatt* v. *Cole*, 504 U.S. 158 (1992), held that private parties invoking state garnishment procedures against other private parties are not entitled to qualified immunity against Section 1983 due process claims. The court did not view *Wyatt* as necessarily dispositive, observing that several courts of appeals have distinguished *Wyatt* and applied qualified immunity to private parties who acted under color of law to serve public, as opposed to private, interests. Pet. App. 9-12 (citing *Eagon* v. *Elk City*, 72 F.3d 1480 (10th Cir. 1996); *Warner* v. *Grand County*, 57 F.3d 962 (10th Cir. 1995); *Sherman* v. *Four County Counseling Ctr.*, 987 F.2d 397 (7th Cir. 1993); *Frazier* v. *Bailey*, 957 F.2d 920, 928 (1st Cir. 1992)).

The court concluded, however, that petitioners could not invoke qualified immunity because, "as employees of a private corporation seeking to maximize

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[4] The statute calls for an initial contract term of three years, "in order to allow the contractor sufficient time to demonstrate its performance," and for evaluation by legislative committees at the end of the second year, before renewal of any contract. Tenn. Code Ann. § 41-24-105 (Supp. 1996) (Pet. App. 54-56).

[5] The Act also specifically denies the contractor the protection of state sovereign immunity. Tenn. Code Ann. § 41-24-107(b) (1990) (Pet. App. 58).

profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation." Pet. App. 15. The profit motive "upsets the balance qualified immunity seeks to establish," which, "at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook." *Id.* at 16. Turning over prison management to a for-profit corporation presents an "increased threat of injury by violation of constitutional guarantees," making qualified immunity for the corporation's employees inappropriate. *Ibid.*

Judge Nelson concurred in the judgment. He questioned the majority's reasoning that there is "a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America." Pet. App. 20. He believed the result was controlled, however, by *Duncan* v. *Peck*, 844 F.2d 1261 (6th Cir. 1988), which he viewed as categorically rejecting qualified immunity for private defendants. Pet. App. 20-21.

SUMMARY OF ARGUMENT

Petitioners are state actors for purposes of constitutional damages liability under 42 U.S.C. 1983, but, under the reasoning of *Wyatt* v. *Cole*, 504 U.S. 158 (1992), and the principles of qualified immunity this Court has developed, we do not believe they should be afforded qualified immunity.

We do not read *Wyatt* as foreclosing extensions of qualified immunity in appropriate circumstances to private individuals who act on the public's behalf. The defendants in *Wyatt* were private persons who

violated due process by enforcing a personal debt through unconstitutional state replevin procedures. In denying them qualified immunity, the Court relied on the fact that they were pursuing private rather than public interests.

In our view, service in the public interest is a necessary but not sufficient predicate for extension of qualified immunity to private individuals. Although petitioners here are pursuing a public function in operating the state prison, they are also employees of a for-profit corporation, and they are not subject to direct or substantial supervision by government employees. As the court of appeals correctly recognized, there is an "increased threat of injury by violation of constitutional guarantees" where governmental authority is wielded by persons answerable principally to a for-profit enterprise rather than to a government entity. Pet. App. 16.

Under this Court's qualified immunity doctrine, immunity is unwarranted here for two principal reasons. First, whereas qualified immunity is needed to protect the decisive and forceful execution of public duties and to ensure the government's ability to attract qualified persons to public service, corporations such as petitioners' employer can use market mechanisms not equally available to government to serve the same ends. By offering increased compensation, insurance, or promises of indemnification, for-profit corporations generally can—without the benefit of qualified immunity—protect their employees from inhibitions caused by the risk of individual damages liability for violation of new or unclear constitutional norms. Government, in contrast, is constrained from providing public officials the same

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degree of protection through contractual arrangements.

Second, application of qualified immunity to bar recovery for constitutional violations is tolerable because government is subject to additional checks against unconstitutional behavior that are absent from the private sector. Public employees have reason to comply with the Constitution, not only because of the deterrent effect of potential damages liability, but because adherence to constitutional rights is part of public employees' mission. Governmental systems of support and accountability seek to ensure that public employees have the training, resources, and incentives to recognize and respect constitutional rights. When corporate employees, such as petitioners, act under the pressures of profit maximization and without direct or substantial supervision by government officials, however, they lack the benefit of those public-sector checks.

Although petitioners are not, in our view, entitled to qualified immunity, the analysis we propose takes into account that in other circumstances there may well be private persons, subject to constitutional tort liability, whose conduct on behalf of the public should be protected by official immunity. Persons such as private physicians under contract to provide medical care to prison inmates, private security officers temporarily deputized by and working under the oversight of the United States Marshal, private citizens cooperating voluntarily with law enforcement, and others who are subject to direct or substantial governmental supervision may require the protections of qualified immunity in order effectively to serve in the public interest. The Court should thus take care to preserve the opportunity for private

individuals acting on behalf of government to seek the protections of qualified immunity in appropriate future cases.

ARGUMENT

EMPLOYEES OF A FOR-PROFIT PRISON MANAGEMENT COMPANY, WHO ARE NOT SUBJECT TO DIRECT OR SUBSTANTIAL GOVERNMENTAL SUPERVISION, SHOULD NOT BE ENTITLED TO INVOKE A QUALIFIED IMMUNITY DEFENSE TO A PRISONER'S CONSTITUTIONAL TORT CLAIM

As petitioners acknowledge (Pet. Br. 14-20), their challenged conduct was action under color of state law for purposes of 42 U.S.C. 1983. Petitioners' authority to confine and transport respondent derived from Tennessee law and the contract between the State and petitioners' employer, the Corrections Corporation of America (CCA). Their authority over respondent thus was "possessed by virtue of state law and made possible only because [they are] clothed with the authority of state law." *West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)).

If petitioners had been employees of the State of Tennessee, working in a state-run institution, they would have been entitled to assert qualified immunity. See generally *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (state prison officials entitled to qualified immunity).[6] The question here is whether peti-

[6] That government employees would be entitled to invoke qualified immunity does not mean that they would necessarily be immune from a claim such as respondent's. The courts below denied immunity on the basis of petitioners' status as non-governmental employees; it did not reach the question whether the alleged conduct violated "clearly established

tioners, who are subject to liability for constitutional torts, are also entitled to invoke the defense of qualified official immunity. That question should not be answered categorically for all private persons, but should depend on whether, in a particular circumstance, applying qualified immunity would serve the doctrine's purposes. Immunities should not lightly be extended, and persons "who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding concerns of public policy." *Forrester* v. *White*, 484 U.S. 219, 224 (1988); see *Butz* v. *Economou*, 438 U.S. 478, 506 (1978).

This Court has rejected the notion that private persons deemed to have engaged in "state action" are, simply by virtue of the state-action determination, entitled to assert qualified immunity. *Wyatt* v. *Cole*, 504 U.S. 158 (1992). The applicability of qualified immunity depends on "the special policy concerns involved in suing government officials." *Id.* at 167. Qualified immunity is designed to protect public employees' ability to act forcefully and decisively in the public interest, and to ensure that able persons are not deterred from public service. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982).

We do not believe the rationales supporting qualified immunity in appropriate circumstances warrant extending it to petitioners in this case. Tennessee has turned over the day-to-day operation of its South Central Correctional Center to a for-profit corporation, relying chiefly on private contractual mecha-

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statutory or constitutional rights of which a reasonable person would have known." See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

nisms rather than governmental institutional safeguards to protect the interests qualified immunity is designed to serve. Extension of qualified immunity in these circumstances appears neither necessary to satisfy the concerns articulated in *Mitchell* and *Harlow*, nor appropriate in light of the absence of important government safeguards.

The Court should affirm the decision of the court of appeals on the ground that qualified immunity should not be extended to guards of a prison run by a for-profit corporation who lack direct or substantial supervision by government officials. The Court should not, however, foreclose the application of qualified immunity in other contexts to private persons not employed by government. When private persons performing governmental functions work under more direct governmental supervision, or in circumstances in which they cannot realistically rely on private insurance or indemnification to protect them from personal liability for violations of new or unclear constitutional standards, they may well be justified in claiming qualified immunity.

A. This Court's Prior Rulings Do Not Resolve The Question Presented

Both petitioners and respondent have suggested—incorrectly in our view—that prior decisions of this Court provide a ready answer to the issue presented in this case. Respondent, for example, suggests that this Court has already considered in *Wyatt* v. *Cole*, *supra*, whether there are any private persons subject to constitutional tort claims who may invoke official immunity, and "answered that question in the negative." Br. in Opp. 5. *Wyatt*, however, addressed the inapplicability of qualified immunity to a private individual and his attorney who enforced a private debt by

invoking a state replevin procedure that was later declared to violate due process. 504 U.S. at 159-160. The Court relied on the fact that such persons are not "principally concerned with enhancing the public good," *id.* at 168, but are pursuing wholly private, financial interests. Because, as *Wyatt* held, qualified immunity is designed "to safeguard government," not to benefit the individuals to whom it applies, *ibid.*, it was inapplicable there. In ruling that the parties before it could not invoke qualified immunity, however, the Court noted that the question decided was a "very narrow one," and that the "precise issue encompassed" only the availability of immunity "for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." *Id.* at 168-169.

Following *Wyatt*, a number of courts of appeals have drawn a distinction between private persons acting in self-interest and those who are, pursuant to some arrangement with a governmental entity, fulfilling a public duty or function. See, *e.g.*, *Eagon* v. *Elk City*, 72 F.3d 1480, 1489-1490 (10th Cir. 1996) (private member of nonprofit historical society administering public event in city park was not invoking state law in pursuit of private ends, and was thus entitled to qualified immunity against First Amendment claim by group denied permission on political grounds to participate in event); *Warner* v. *Grand County*, 57 F.3d 962, 964-967 (10th Cir. 1995) (female director of private crisis center who carried out strip search of female suspect at request of male police officers acted as "an 'auxiliary' to police search procedures" in an effort to minimize intrusiveness of search and was entitled to qualified immunity); *Williams* v. *O'Leary*, 55 F.3d 320, 323-324 (7th Cir.) (private physician under

contract to provide medical care to prisoners was entitled to qualified immunity), cert. denied, 116 S. Ct. 527 (1995); see also *Sherman* v. *Four County Counseling Ctr.*, 987 F.2d 397, 406 (7th Cir. 1993) (private psychiatric facility entitled to qualified immunity against Fourth Amendment claims based on center's assessment of putatively dangerous individual at request of police, and detention of individual pursuant to court order); cf. *Burrell* v. *Board of Trustees*, 970 F.2d 785, 796 (11th Cir. 1992) (denying qualified immunity to private persons conspiring with public officials for the purpose of infringing constitutional rights, but distinguishing cases in which private persons assumed public duties for public purposes), cert. denied, 507 U.S. 1018 (1993). Indeed, the court below also recognized the potential difference between *Wyatt* and cases involving private persons using governmental authority to serve the public. Pet. App. 8-9.

For their part, petitioners mistakenly assert that this Court's "functional" approach to immunity dictates application of qualified immunity in their favor. See, *e.g.*, Pet. Br. 22-23, 36-38. The Court, however, has used a functional approach principally to determine what degree of immunity applies—absolute or qualified. The Court has held that absolute immunity applies not to particular officials, but to the performance of judicial, prosecutorial, or other "functions." See, *e.g.*, *Harlow*, 457 U.S. at 812-813; *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985); *Forrester*, 484 U.S. at 224. The Court has not, however, extended official immunity to non-governmental personnel simply because they performed public functions. Thus, this Court's prior rulings do not provide a categorical answer to the question presented.

B. The Policies Justifying Qualified Immunity Do Not Support Extending It To Petitioners

Despite the fact that 42 U.S.C. 1983 "on its face admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has accorded immunity to a wide range of government officials, where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). The policy reasons for recognizing official immunity are aimed at "protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167-168. In delimiting the bounds of the official immunity doctrine, this Court has consistently endeavored to strike a proper balance between the risks that officials will be inhibited in public service by their fear of personal liability, and the countervailing need to maintain incentives for persons entrusted with governmental power not to abuse it and to provide compensation to those who have been injured by unconstitutional official conduct. *Harlow*, 457 U.S. at 819; *Wyatt*, 504 U.S. at 167.

1. *Private corporations, including petitioners' employer, have alternative means, not equally available to governmental employers, to attract able employees and to protect their exercise of discretion on the job*

Qualified immunity responds to the concern that individuals, faced with the risk of constitutional claims against them in their personal capacity, will be distracted by their private interests in avoiding suit and thus will not fully pursue the public duties they

were hired to perform. The Court has identified three related risks posed by baseless litigation against public officials: "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Concern over personal liability may "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Id.* at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)). Qualified immunity accordingly seeks to assuage public employees' concerns about litigation by immunizing them from personal liability for damages for constitutional violations, except where they allegedly violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Qualified immunity provides a defense against litigation as well as liability; it is to be applied as early as possible in a lawsuit, *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987), and interlocutory orders denying qualified immunity may be immediately appealed, *Behrens* v. *Pelletier*, 116 S. Ct. 834 (1996); *Mitchell* v. *Forsyth*, *supra*.

The risk of personal liability may adversely affect private as well as public employees—particularly where, as here, private employees are performing the same functions fulfilled in government institutions by public employees. There are, however, alternative mechanisms available to private corporate employers to serve the same policy goals that qualified immunity serves for public employees. A private-sector employer can ameliorate excessive timidity caused by employees' fears of personal liability by offering them

appropriate incentives, such as liability insurance, promises of legal representation, or indemnification for adverse judgments.[7] Private corporations that perform governmental functions, and thereby are subject to the Constitution, can use such tools to ensure that their employees are neither too cautious in their execution of their duties nor inattentive to established constitutional rights. Although insurance against constitutional tort liability, or offers of indemnification or other enhanced compensation, add costs to corporate performance of public functions, those costs can be taken into account in bidding on contracts to perform such functions. Moreover, as the court of appeals recognized, the additional expense to government, if any, may be offset by decreased management and oversight costs. Pet. App. 17.

In this case, private market mechanisms presumably were available to petitioners' employer, CCA, to protect against the adverse effects that the risk of personal liability might have on the willingness of qualified persons to work for CCA and on CCA employees' ability to function in their jobs. It appears that the contract between CCA and the State contemplated that CCA would undertake to accept the costs associated with shielding its employees from undue burdens of constitutional tort litigation. Tennessee law specifically requires that contractors

[7] See, *e.g.*, Del. Code Ann. tit. 8, § 145 (Michie 1991) (authorizing corporation's indemnification of its personnel against legal expenses, judgments, fines and reasonable settlements); *Waltuch* v. *Conticommodity Servs., Inc.*, 88 F.3d 87, 89-95 (2d Cir. 1996) (interpreting Section 145 of Title 8 of the Delaware Code to limit allowable corporate indemnification to good-faith conduct).

performing correctional functions insure against liability for "civil rights claims." Tenn. Code Ann. § 41-24-107(a)(2) (1990) (Pet. App. 57). The contractor's insurance must be "adequate to assure the contractor's ability to fulfill its contract with the state in all respects." *Id.* § 41-24-107(a)(2)(C) (Pet. App. 58).

While private corporations have broad latitude to provide advance guarantees of indemnification to their officers, directors, employees, and agents, and unilaterally to set compensation at levels adequate to attract qualified employees, government is more limited in its freedom to do so. At the federal level, government employees' salaries are set under a detailed statutory scheme. See generally 5 U.S.C. 5301-5392. The government has only a limited ability to indemnify its employees for constitutional tort liability and is unable to promise in advance to indemnify employees for judgments of unknown magnitude.

The United States Department of Justice, for example, provides by regulation that it "may" indemnify an employee for an adverse judgment or settlement, where "such indemnification is in the interest of the United States, as determined by the Attorney General or his designee." 28 C.F.R. 50.15(c)(1) and (2).[8]

[8] Other agencies have similar indemnification provisions. See, *e.g.*, 13 C.F.R. 114.110 (Small Business Admin.); 14 C.F.R. 1261.316 (Nat'l Aeronautics and Space Admin.); 17 C.F.R. 142.1-142.2 (Commodity Futures Trading Comm'n); 22 C.F.R. 21.1 (Dep't of State); 22 C.F.R. 207.01 (Agency for Int'l Dev.); 31 C.F.R. 3.30 (Treasury); 32 C.F.R. 516.32 (Army, Dep't of Defense); 34 C.F.R. 60.1-60.2 (Education); 38 C.F.R. 14.514(c) (Veteran's Affairs); 43 C.F.R. 22.6 (Interior); 45 C.F.R. 36.1 (Health and Human Servs.).

Indemnification decisions are discretionary, and, absent extraordinary circumstances, they are made only after litigation is completed. *Id.* § 50.15(c)(1), (3) and (4). Moreover, such indemnification must be paid out of agency appropriations rather than out of the judgment fund established for liability against the United States, *Indemnification of Department of Justice Employees*, 10 Op. Off. Legal Counsel 6, 8-9 (1986); 31 U.S.C. 1304, and any payment is "contingent upon the availability of appropriated funds of the employing component of the Department of Justice." 28 C.F.R. 50.15(c)(5). An advance commitment to provide unlimited indemnification would likely run afoul of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), which forbids the obligation of funds not already appropriated, and the Adequacy of Appropriations Act, 41 U.S.C. 11(a), which forbids the government to obligate itself by contract "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." See *Indemnification Agreements and The Anti-Deficiency Act*, 8 Op. Off. Legal Counsel 94 (1984); *Proposed Indemnification of Department of the Treasury Officers and Employees*, 15 Op. Off. Legal Counsel 70, 78 (1991). Insofar as insurance against personal liability is concerned, Congress has recently authorized payments limited to one-half of the costs of professional liability insurance for agency law enforcement officers and supervisory or management officials. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Tit. VI, § 636, 110 Stat. 3009 [1080-1083 (enrolled

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States also have programs for indemnification of their employees. See 5 F. Harper, F. James & O. Gray, *Law of Torts* § 29.9, at 664 n.20 (2d ed. 1986).

version)] (*reproduced at* 142 Cong. Rec. H11,741 (daily ed. Sept. 28, 1996)). Those payments must be drawn from amounts appropriated for agency salaries and expenses. *Ibid.* In sum, federal government indemnification and insurance of official constitutional tortfeasors is limited and contingent; the government's indemnification programs do not—and cannot—"make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases." *Anderson*, 483 U.S. at 642 n.3. In contrast, the greater flexibility of a corporate employer such as CCA to provide indemnification, insurance, or other compensation to counterbalance the inhibiting effects of constitutional tort liability supports a refusal to extend *Harlow* to petitioners.

2. ***Government employees are deterred from violating constitutional rights by factors not equally applicable to employees of for-profit corporations who are not subject to direct or substantial governmental supervision***

A decision not to extend qualified immunity is particularly appropriate here, where CCA employees are not subject to substantial or direct supervision by public officials. Although affording qualified immunity to public employees results in denial of compensation for some constitutional torts, and therefore decreases the general deterrent effect of damages liability, that decrease is tolerable in part because alternative systems of public accountability create additional incentives for government to minimize constitutional lawbreaking. Those incentives are diluted in the private context.

Constitutional compliance is a core mission of government, and that is a key characteristic that distin-

guishes government from the private sector. In the public sector, decisions about professional recognition and promotion are based not on employees' contribution to the profitability of the entity, but on a wider range of factors that may place less pressure on individuals to cut constitutional corners. In order to ensure regularity of decisionmaking and to maximize accountability, public institutions are highly structured, with employees organized in clear hierarchies. Every federal employee is specifically required by federal law to take an oath to uphold the Constitution of the United States, as are all "executive officers" of the States. 5 U.S.C. 3331; 4 U.S.C. 101. Federal employees' duties are generally governed by detailed rules and regulations. See, *e.g.*, 28 C.F.R. Pts. 500-572 (BOP regulations). Public employees are also trained to know the constitutional rules that apply to their fields of work, and, consistent with that training, this Court presumes that they know the law. See *Harlow*, 457 U.S. at 818-819. Governmental entities are ultimately responsible to the public through the political process: The highest level Executive Branch officials are subject to Senate confirmation, and Congress can also control agency action by legislation and by ongoing legislative oversight. For all these reasons government employees generally have the commitment and incentives to comply with constitutional norms, notwithstanding that qualified immunity might decrease the general deterrent force of constitutional tort litigation against them.

Where governmental functions are carried out by employees of a for-profit corporation without direct or substantial supervision by government employees, the public safeguards that minimize constitutional violations are attenuated. As the court of appeals

recognized, corporations and their employees are motivated to seek to maximize profits. See Pet. App. 15. One need not assume improper purposes on the part of such employees to recognize that the profit motive distinguishes them from employees of governmental institutions. In the corporate setting, decisions about how much training to provide, for example, and how to design institutional procedures, are driven by cost concerns, creating circumstances in which the risks of constitutional violations might be higher than they are where government is in charge. Specifically, to the extent that qualified immunity decreases the exposure of a workforce to constitutional tort liability, it makes lawbreaking less expensive—thereby decreasing incentives for a profit-making institution to devote resources to avoid constitutional torts in the first place. Thus, the availability of qualified immunity may decrease the level of corporate resources allocated to educating and training employees to recognize and avoid constitutional violations, and may cause less to be spent on establishing routines, policies, and disciplinary structures to minimize unconstitutional action by its employees. The court of appeals correctly identified an "increased threat of injury by violation of constitutional guarantees" where governmental authority is wielded by persons answerable principally to a private, profit-making enterprise rather than to a government entity. *Id.* at 16.

The absence of direct governmental supervision of CCA's employees "counsels against granting qualified immunity" to petitioners in this case. Pet. App. 16. The CCA contract with Tennessee appears to be a "turn-key" type of contract, under which CCA rather than the State is responsible for running the prison.

Tennessee law authorizes the operation of an entire medium-security or minimum-security facility under a single contract, and petitioners state that CCA now operates several of the State's prisons. See Tenn. Code Ann. § 41-24-103(c) (Supp. 1996) (Pet. App. 51); Pet. Br. 7. To be sure, the State retains ultimate control of the prisons, both through monitoring by its Commissioner of Correction and by periodic evaluation by pertinent committees of the state legislature. See Tenn. Code Ann. §§ 41-24-105, 41-24-109 (1990 & Supp. 1996) (Pet. App. 54, 59). There is, however, no requirement—or evidence—of direct or substantial state supervision of the contractor's activities.

A cautious approach to expanding qualified immunity here is particularly warranted because prison privatization is a social experiment that is still in its early stages. The ability of contractors to perform efficiently while safeguarding constitutional rights is as yet unproven. Maintaining strong incentives for adherence to constitutional principles—such as those provided by the prospect of civil litigation—should enhance prospects for the continued success of such experiments.[9] Accordingly, based on all of the foregoing considerations, the balance weighs against extending qualified immunity to petitioners.

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[9] Petitioners contend that, as a factual matter, CCA and other prison contractors have a good record to date on adherence to constitutional constraints. Pet. Br. 43-45; see also International City/County Management Association, et al., Amici Br. 19-25. That attempt to make immunity turn on an empirical inquiry into contractor performance misses the point, both because it ignores fundamental structural and legal differences between public and private organizations, and because prison privatization is still in its experimental stages, with a very limited track record.

C. Some Private Individuals Acting On Government's Behalf Under Direct Or Substantial Government Supervision May Well Be Entitled To Invoke Qualified Immunity

Although petitioners are not, in our view, entitled to invoke qualified immunity, the Court should refrain from holding categorically that private constitutional tort defendants may never be protected by qualified immunity. The key factors that make qualified immunity inappropriate here are the availability of market mechanisms to protect CCA employees from concerns about constitutional liability that might unduly inhibit them from boldly executing their duties, and the absence of sufficient governmental supervision over the actions in question to ensure that, if qualified immunity were extended, meaningful safeguards against constitutional violations would remain. In other contexts, however, the absence of one or both of those factors may indeed support extension of qualified immunity to private individuals acting on behalf of the government.

1. For example, while some physicians who provide medical services to inmates are government employees, others provide such services on a contract basis. Regardless of their status, however, prison physicians may become the target of Eighth Amendment damage suits, on the theory that their actions amounted to "deliberate indifference" to the prisoner's condition. See, *e.g.*, *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). When such suits are brought against physicians who provide services in prisons on a contract basis, qualified immunity should protect them because neither of the factors that counsels the result we advocate here would apply. The accountability of medical personnel to public officials affords

strong institutional safeguards against constitutional violations, and, in light of such safeguards, the "increased threat" of constitutional injury so important to the analysis of petitioners' immunity claims (see Pet. App. 16) is absent. Moreover, the difficulties and costs faced by individual physicians in obtaining private constitutional-tort liability insurance may be considerable. If performing contract work for government subjects them to the possibility of baseless Eighth Amendment litigation without the prospect of immunity, then capable physicians may well shun such work in favor of other work that does not pose such risks. Under these circumstances, we believe the balance of *Harlow* factors would weigh in favor of extending immunity.

2. Contractors who might be subjected to constitutional tort claims simply for carrying out instructions given by government officials should also be entitled to invoke qualified immunity. An example of contract personnel for whom qualified immunity might be available are court security officers that work for the United States Marshals Service under contracts with private security companies. Although such officers are not public employees, they work, for example, in federal courthouses, subject to the oversight of United States Marshals.[10] In the event that a United States Marshal directed heightened security on a particular day, requiring a contract officer to perform a search that led to a Fourth Amendment deprivation claim, the fact that the contract officer's actions were taken under federal

[10] Contract officers of the Marshals Service are deputized while on duty. See General Accounting Office Report, *Federal Judicial Security*, GAO/GGD-94-112, at 64-65 (1994).

officials' direction would support that officer's invocation of qualified immunity. Those circumstances provide a substantial safeguard against constitutional violations.

In general, federal government contracting regulations authorize agencies in certain circumstances to enter into employment-like contracts with non-employees, under which contractors are subject to day-to-day supervision and control by government employees. 48 C.F.R. 37.101, 37.104(c)(2). Such contracts must be specifically statutorily authorized, because "[t]he Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws." 48 C.F.R. 37.104(a). Persons working for the government under such contracts may be entitled, if they are sued for alleged constitutional violations, to invoke qualified immunity.

3. Private citizens may also be subject to constitutional tort actions when they cooperate voluntarily with governmental activities at the request and under the direction of governmental officials, and in those circumstances, too, private individuals should be able to invoke qualified immunity.[11] For example, federal law enforcement agencies frequently enlist the aid of private citizens or corporate entities to provide "backstopping" for undercover operations. "Backstopping" refers to the practice of officials of financial institutions vouching for the existence and credit history of fictitious business enterprises that are used by federal agents as part of law enforcement

[11] Some of the court of appeals cases distinguishing *Wyatt* and applying qualified immunity to private persons have involved volunteers. See, *e.g.*, *Eagon*, *supra*; *Warner*, *supra*.

operations. The targets of such investigations might sue the volunteers as well as the federal agents under *Bivens*.[12]

Such volunteers generally have a limited role in an investigation and act under the guidance of law enforcement personnel. Accordingly, as in the previous examples, supervision by government employees safeguards against constitutional infringements. The fact that such persons are cooperating voluntarily also supports extending qualified immunity to them, because the risk of personal liability could otherwise deter able citizens from assisting government in the absence of any compensation whatsoever to offset that risk. Here again, contractual mechanisms to protect against baseless litigation are not practically available.

4. Employees of private regulatory or standards-enforcement organizations acting under specific statutory mandates may also warrant official immunity protections. For example, Congress has directed that the Medicare program make use of private Peer Review Organizations (PROs) to review the quality and appropriateness of medical services provided to Medicare beneficiaries. See 42 U.S.C. 1320c *et seq.* Where members of a PRO determine that a Medicare provider has acted in violation of the pertinent standards, they report that conclusion to federal officials, with a recommendation of sanctions. Targets

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[12] An example of such a case currently pending is *Brown* v. *NationsBank*, Civ. No. G-96-112 (S.D. Tex.). Private citizens acting as informants to law enforcement officials have also been named as *Bivens* defendants. See, *e.g.*, *Wang* v. *United States*, 947 F.2d 1400 (9th Cir. 1991); *Beard* v. *O'Neal*, 728 F.2d 894 (7th Cir.), cert. denied, 469 U.S. 825 (1984).

of PRO recommendations have raised constitutional claims against medical professionals who participate in peer reviews. See, *e.g.*, *Kwoun* v. *Southeast Missouri Professional Standards Review Org.*, 811 F.2d 401 (8th Cir. 1987), cert. denied, 486 U.S. 1022 (1988). Because peer review involves prosecutorial and adjudicative functions carried out under color of law, courts have accorded absolute immunity even to private persons who act as reviewers. *Id.* at 407-408; see *Wood* v. *Freedman*, 947 F.2d 948 (Table), 1991 WL 222150 (7th Cir. 1991), cert. denied, 505 U.S. 1206 (1992); see also *Austin Mun. Sec.* v. *National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) (extending immunity to members of association of securities dealers acting under federal statutory authority); *Clulow* v. *Oklahoma*, 700 F.2d 1291, 1298 (10th Cir. 1983) (extending immunity to official of state bar association acting under the rules of state supreme court). Under our analysis, those holdings should not be affected by denial of petitioners' claim of qualified immunity.

* * * * *

Although this case presents no occasion for the Court to determine whether private persons engaging in the kinds of activities we describe should be granted qualified immunity, these examples support a ruling in favor of respondents on the grounds we propose, leaving open the possibility that private individuals in other circumstances might be entitled to seek the protections of qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1997